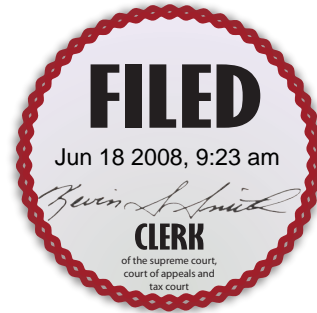


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN BURKE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0711-CR-954

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Magistrate
Cause No. 49G22-0706-FC-105309

June 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Brian Burke appeals his conviction of Auto Theft. We reverse.

Issue

While Burke raises multiple issues on appeal, we address only the dispositive issue: whether there was sufficient evidence to find him guilty of Auto Theft.

Facts and Procedural History

Timothy Green fell asleep on his couch and awoke to find his keys and automobile missing. Five days later, Indianapolis Metropolitan Police Department (“IMPD”) Officer Tanya Eastwood observed Burke driving Green’s car and arrested him.

The State charged Burke with Auto Theft. The trial court found him guilty. Burke now appeals.

Discussion and Decision

Burke asserts that there was not sufficient evidence to support the conviction. Our standard of review is well-established.

In reviewing a claim of insufficient evidence, we will affirm the conviction unless, considering only the evidence and all reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Bethel v. State, 730 N.E.2d 1242, 1243 (Ind. 2000) (citations omitted). For the crime of Auto Theft, the State must prove beyond a reasonable doubt that the defendant “knowingly or intentionally exert[ed] unauthorized control over the motor vehicle of another person, with intent to deprive the owner of the vehicle’s value or use.” Ind. Code § 35-43-4-2.5(b)(1).

The unexplained possession of a recently stolen item supports an inference of theft. Steele v. State, 475 N.E.2d 1149, 1154 (Ind. 1985). In Steele, our Supreme Court affirmed a burglary conviction where a witness testified that the defendant possessed the stolen items “on the evening of the burglary.” Id. However, “where any considerable length of time has elapsed from the time of the theft to the time of the arrest there must be some showing that defendant has had the exclusive possession of the property during that period of time.” Muse v. State, 419 N.E.2d 1302, 1304 (Ind. 1981). Indiana appellate courts have reversed Burglary and Auto Theft convictions where the unexplained possession was not recent and the State failed to prove exclusive possession. Kidd v. State, 530 N.E.2d 287 (Ind. 1988) (concluding one to four days was not recent); Buntin v. State, 838 N.E.2d 1187 (Ind. Ct. App. 2005) (concluding five days was not recent); and Trotter v. State, 838 N.E.2d 553 (Ind. Ct. App. 2005) (concluding five days was not recent). Earlier this year, our Supreme Court denied transfer of this Court’s decision to reverse an Auto Theft conviction where the defendant possessed a car fifteen days after it was stolen and the State failed to establish his exclusive possession during that time. Shelby v. State, 875 N.E.2d 381 (Ind. Ct. App. 2007), trans. denied.

In this case, when Green fell asleep, his keys were on a coffee table next to him and his gold 2001 Chevrolet Cavalier was in relatively good condition and sitting in his driveway. He woke hours later and found that his keys and Cavalier were missing.

Five days later, Burke was driving a gold 2001 Chevrolet Cavalier, when Officer Eastwood stopped Burke for a traffic infraction. The rear windshield was missing. Burke

told Officer Eastwood that he did not have his driver's license, identification, or the vehicle's registration and that he did not know who owned the vehicle. The license plate on the Cavalier did not match the State's records for that vehicle; research on the vehicle identification number revealed that Burke was driving Green's Cavalier and that it had been reported as stolen. Officer Eastwood placed Burke under arrest and found his identification. During the arrest, Burke's mother arrived and yelled "I told you that m----- f----- car was stolen." Transcript at 49-50.

Based upon the above authority, Burke's unexplained possession of the Cavalier five days after it was stolen was not "recent" for purposes of this analysis. See Kidd, 530 N.E.2d at 288. Therefore, the State was obligated to prove that Burke exclusively possessed the Cavalier. While the evidence may have supported an inference that Burke knew that the car was stolen, the State offered no evidence from which to infer that he exclusively possessed the Cavalier or that he took the car from Green's driveway. Accordingly, the evidence did not support Burke's conviction of Auto Theft.

Apparently anticipating this conclusion, the State argues on appeal that:

The charging information is unclear as to whether Defendant was charged with actually stealing the vehicle, subsection b, or with possessing it after it was stolen, subsection c. Here, both parties argued throughout the trial that Defendant's knowledge of whether the vehicle was stolen was the crux of the case. Therefore, the State assumes that his conviction was based on I.C. § 35-43-4-2.5(c).

Appellee's Brief at 5 n.6. The State misstates the record. Pursuant to Indiana Code § 35-43-4-2.5(b)(1), it charged that Burke "did knowingly exert unauthorized control over the [Cavalier] with intent to deprive [Green] of [its] value or use." Appendix at 18. The

Information made no suggestion that Burke received or retained a motor vehicle, pursuant to Indiana Code Section 35-43-4-2.5(c).

Reversed.

FRIEDLANDER, J., and KIRSCH, J., concur.